HON'BLE THE CHIEF JUSTICE SRI G.S. SINGHVI
AND
HON'BLE SRI JUSTICE G.V. SEETHAPATHY

Writ Appeal No.705 of 2006

Between:

M/s. Balaji Godowns & others. … Appellants

And

Andhra Pradesh State Warehousing Corporation, rep. by its Managing Director, Hyderabad & others. … Respondents

:: JUDGMENT ::

Counsel for the Appellants : Sri S.Lakshma Reddy

26th June, 2006

Per G.S.Singhvi, C.J.

Whether a litigant can file successive petitions under Article 226 of the Constitution of India in relation to the same cause is the question which arises for determination in this appeal filed by the appellants for setting aside order dated 28-2-2006 passed by the learned Single Judge in Writ Petition No.23643 of 2005.

For deciding the aforementioned question, we may briefly notice the facts:

In furtherance of the policy decision taken by the Government of India for construction of godowns in various parts of the State of Andhra Pradesh for storage of foodgrains, the Food

Corporation of India (for short 'FCI') entered into an agreement dated 19-9-2001 with the Andhra Pradesh State Warehousing Corporation (for short 'the State Corporation') whereby the former agreed to give seven years guarantee for using godowns to be constructed by the latter and pay storage charges on par with the Central Warehousing Corporation. Thereafter, the State Corporation issued short tender notice dated 2-2-2001 inviting offers from the private parties for construction of godowns of 5,000 MTs. capacity each with total capacity of
25,000 MTs. The highest bids given by the appellants were accepted and they were awarded contract for construction of godowns, which were to be completed on or before 5-2-2002. The appellants could not complete construction of the godowns within the time specified in the contract. However, on a representation made by them, which was supported by the State Government, the Central Government waived the condition regarding completion of construction within the stipulated time. The appellants are said to have completed construction of godowns in the month of October, 2004. However, the State Corporation refused to take the godowns for storage of foodgrains apparently on the ground of non-fulfillment of the conditions of contract. Thereupon, the appellants filed Writ Petition Nos.7663 and 12337 of 2005 for issue of a mandamus to the FCI to grant approval to the State Corporation to take possession of the godowns constructed at Jammikunta and pay rent for the same. The learned Single Judge dismissed both the petitions by a common order dated 9-9-2005. He held that there was no privy of contract between the appellants and FCI and, therefore, the latter cannot be compelled to ask the State Corporation to take the godowns. Paras 21 and 22 of the order

passed by the learned Single Judge read as under:

> "21. It is not in dispute that A.P. State Warehousing Corporation on one hand and the writ petitioners on the other hand entered into agreements. The Food Corporation o f India is not a party to the said agreements. Sri C. Ramchandra Raju, the learned Counsel appearing for the petitioner in W.P.No.7663/2005 has strenuously contended that though Food Corporation of India is not a party to the agreements, the subsequent conduct of the officials of the Food Corporation of India such as repeated inspections of the godowns while constructions were under progress indicates that the Food Corporation of India is also bound by the terms of the agreement. I have gone through the terms of the agreement dt.18th October, 2001 between the parties. Food Corporation of India is not a party to the agreement which fact is not in serious dispute. The writ petitioners intend to fasten the liability on the Food Corporation of India to take the godowns constructed by them on lease basing on the agreement of guarantee executed by the Food Corporation. Since much emphasis has been laid on the terms of the agreement, I deem it appropriate to extract the agreement of guarantee and it is thus:
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> > "1.0. This deed of guarantee made this day of 19th September, 2001 between the Food Corporation of India (hereinafter called "FCI") represented by the Senior General Manager, FCI, Hyderabad on one part and the Andhra Pradesh, State Warehousing Corporation (hereinafter called "APSWC") represented by the Managing Director, APSWC, or the other part.
> >
> > 2.0. Whereas the FCI has agreed to give 7 (seven) years guarantee for using godowns to be constructed by APSWC or to be got constructed at Jammikunta along with the tonnage as decided by SRM, FCI and intimated to the APSWC as 50,000 MTs and has agreed to make such payments of storage charges to APSWC on par with CWC subject to the

specifications of godowns and services of storage being equal as per instructions, from time to time, issued by FCI, Headquarters.

3.0. This guarantee shall be applicable to the godowns where construction is completed in all respects as per FCI specifications including weighbridges and other infrastructures and fit for operations handed over to FCI within a period of 4 (four) months or earlier from the date of agreement in each case prospecdtively."

22. It is clear from the terms of the agreement that the guarantee was to the APSWC in respect of the godowns which were to be completed in all aspects within four months from 19th September, 2001. At this juncture, I may reiterate the prayer of the writ petitions. They prayed for issuance of writ of Mandamus against the Food Corporation of India to take possession of the godowns constructed by them at Jammikunta of Karimnagar District. One of the conditions for exercising power under Art. 226 of the Constitution for issuance of Mandamus is that the Court must come to the conclusion that the aggrieved party has a legal right which entitles him to any of the rights and that such rights have been infringed. Admittedly, the petitioners are not parties to the agreement of guarantee executed between APSWC on one hand and FCI on the other hand and likewise FCI is not a party to the agreements executed between the writ petitioners on one hand and APSWC on the other hand. When there is no legal duty on the part of the FCI to take possession of the godowns constructed by the petitioners on lease, no mandamus can be issued to the FCI. Accordingly, I find that the writ petitions are misconceived and are not maintainable against the FCI and the same are liable to be dismissed."

After a gap of few months, the appellants filed fresh writ petition and prayed that the respondents be directed to implement

the instructions issued by the Government of India vide Circular dated 26/27-3-2003 and take over 25,000 MTs godowns and pay the rent. The same was registered as Writ Petition No. 23643 of 2005. The learned Single Judge dismissed the writ petition by observing that order dated 9-9-2005 passed in Writ Petition Nos. 7663 of 2005 and 12337 of 2005 operates as res judicata. The relevant extracts of the second order passed by the learned Single Judge read as under:

> "Though the learned counsel for the petitioners contended that since the petitioners in this writ petition are seeking implementation of the instructions of the Government of India dated 26-3-2003, it cannot be said that the order in the earlier writ petitions operates as res judicata, I am unable to agree.
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> A perusal of the order in W.P.Nos.7663 and 12337 of 2005 shows that this Court having considered all the contentions raised by the petitioners including that the action of the FCI in declining to take over the godowns on the ground of non-feasibility is hit by the principles of promissory estoppel, held that since there is no legal duty on the part of the FCI to take possession of the godowns constructed by the petitioners on lease, no Mandamus can be issued to the FCI. The present writ petition is nothing but seeking review of the said order which has become final. Such a course is not open to the petitioners and the writ petition being misconceived is liable to be dismissed on that ground alone.
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> The learned counsel for the petitioners while placing reliance upon the decision of the Supreme Court in FOOD CORPN. OF INDIA v. BHANU LODH {(2005) 3 SCC 618} contended that the FCI is bound by the instructions of the Government of India. The ratio laid down in the particular facts and circumstances of the said case is clearly distinguishable and does not attract to the case on hand.
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> The writ petition is misconceived and I do not find any justifiable reason to issue a writ of Mandamus compelling the respondents to take over the godowns constructed by

the petitioners."

Sri S.Lakshma Reddy argued that the reasons recorded by the learned Single Judge for refusing to entertain the second writ petition should be declared as legally untenable because prayers made in the two writ petitions were entirely different. He submitted that two writ petitions were founded on different set of facts and, therefore, the second petition filed for issue of a direction to the respondents to implement the instructions issued by the Government of India cannot be treated as barred by res judicata.

We have given serious thought to the argument of the learned counsel, but have not felt impressed. As per their own showing, the appellants had unsuccessfully filed Writ Petition Nos.7663 of 2005 and 12337 of 2005 for issue of a mandamus to the FCI to grant of approval to the State Corporation to take possession of the godowns constructed by them for storage of foodgrains etc. The learned Single Judge dismissed both the writ petitions by recording detailed reasons, some of which have been extracted hereinabove. Though the prayer made in the second writ petition is so articulated as to give an impression that the same is founded on a cause which has nothing to do with the earlier litigation, but a careful reading of the pleadings of both the cases make it clear that the relief sought by the appellants was founded on the same cause. In both the petitions, they averred that the decision of the Government of India to waive the condition regarding construction of the godowns within the specified time amounted to an assurance that even if there is a delay in completion of construction the State Corporation will take possession of the godowns and pay rent in terms of the agreement entered into between the FCI and the State Corporation. Therefore, it is not possible to agree with the learned

counsel that two writ petitions were founded on different causes.

In our opinion, even though dismissal of Writ Petition Nos.7663 and 12337 of 2005 cannot strictly be treated as res judicata and the learned Single Judge appear to have erred in holding so, we are convinced that the appellants are liable to be non-suited by invoking the policy underlying the provisions contained in Order II, Rule 2 of the Code of Civil Procedure. Undisputedly, the relief sought by the appellants in the second writ petition could have been sought by them in the earlier round of litigation. In the first round of litigation, it was open to the appellants to take all the grounds available for issue of a direction to the respondents to act in accordance with the decision of the Central Government, which had waived the time limit for construction of godowns. It was also open to the appellants to take some of the grounds and give up others. By omitting to rely on the policy decision taken by the Central Government to waive the time limit for construction of godowns, the appellants will be deemed to have abandoned some of the grounds available with them for issue of a mandamus to take possession of the godowns. Therefore, it was not open to them to file second petition for grant of relief which they could have legitimately claimed in the earlier petition. In view of the above, we are inclined to approve the view taken by the learned Single Judge that the second writ petition filed by the appellants was not maintainable.

In **Sarguja Transport Service v. State Transport Appellate Tribunal, Gwalior**[1], the Supreme Court was called upon to consider a somewhat similar question. The facts of that case were that on the expiry of the stage carriage permit of the existing operator, namely, the Janta Transport Cooperative Society,

the appellant filed an application for grant of permit to operate on Jashpurnagar to Ambikapur. The existing operator also made an application for renewal of permit. The renewal application was dismissed by the Regional Transport Authority as barred by time and permit was granted to the appellant. That order of the Regional Transport Authority was challenged by M/s. Ali Ahmed and Sons (respondent No.3). The State Transport Appellate Tribunal set aside the order of the Regional Transport Authority. The appellant challenged the order of the Appellate Tribunal by filing writ petition under Articles 226 and 227 of the Constitution. However, the same was dismissed as withdrawn. Later on, the appellant filed another writ petition. The second petition was dismissed by the High Court of Madhya Pradesh as not maintainable. While approving the judgment of the High Court, their Lordships of the Supreme Court laid down the following proposition:

> "In order to prevent a litigant from abusing the process of the Court by instituting suits again and again in the same cause of action without any good reason the Civil Procedure Code insists that he should obtain the permission of the Court to file a fresh suit after establishing either of the two grounds mentioned in Order 23 Rule 1(3). The principle underlying the above rule is founded on public policy, but it is not the same as the rule of res judicata. This principle underlying Rule 1 of Order 23 should be extended in the interests of administration of justice to cases of withdrawal of writ petition also, not on the ground of res judicata but on the ground of public policy. That would also discourage the litigant from indulging in bench hunting tactics. In any event, there is no justifiable reason in such a case to permit a petitioner to invoke the extraordinary jurisdiction of the High Court under Art.226 once again. While the withdrawal of a writ petition filed in a High Court without permission to file a

fresh writ petition may not bar other remedies like a suit or a petition under Art.32 since such withdrawal does not amount to res judicata, the remedy under Art.226 should be deemed to have been abandoned by the petitioner in respect of the cause of action relied on in the writ."

On the basis of above discussion and by applying ratio of the above noted judgment of the Supreme Court to the facts of this case, we hold that the appeal is meritless and is liable to be dismissed. Ordered accordingly.

G.S.SINGHVI, C.J.

26th June, 2006

G.V.SEETHAPATHY, J.

svs

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[1] AIR 1987 SC 88